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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PETER MARTIN WIELAND, Defendant and Appellant.	H021941 (Santa Clara County Super.Ct.No. 207847)

I. Introduction

On January 7, 1998, defendant Peter Martin Wieland was driving north on Highway 85 when he swerved off the road and killed California Highway Patrol (CHP) Officer Scott Greenly, who was standing next to a truck on the shoulder. At the time, defendant was under the influence of alcohol, a prescription drug, methamphetamine, and marijuana. He was later charged with second degree murder. At trial the primary issue was whether he acted with implied malice: Did he know his driving under the influence posed a danger to the lives of others; and did he consciously disregarded that danger.

Defendant appeals from a judgment entered after a jury convicted him of second degree murder. He claims there is insufficient evidence to support his conviction. He claims the court committed two instructional errors: refusing to give a pinpoint instruction on presumptions that may arise from different blood-alcohol levels; and

giving CALJIC No. 17.41.1. He also claims the court erred in admitting documentary evidence to prove three of his four prior convictions for driving under the influence. And last, he claims the court erred in declining to reduce his conviction to manslaughter.

We affirm the judgment.

II. Facts

In 1974, defendant was diagnosed with bipolar disorder, also called manic depression, which involves periods of manic hyperactivity and periods of depressed inactivity. Lithium stabilized his condition for several years. However, in 1993, he threatened to commit suicide and was hospitalized. After he was discharged, Doctor Himani Natu, a psychiatrist, monitored his Lithium level and warned him not to use drugs or alcohol. The labels on the bottles of Lithium also warned that Lithium can cause drowsiness and should not be mixed with alcohol and that care should be taken when operating a car. Natu testified that whenever defendant's symptoms flared up, she made sure he was taking the right dose of medication. She continued to warn against using alcohol and recreational drugs like marijuana because, as she explained, they can cause erratic behavior, aggravate his symptoms, and increase his level of stress.

In 1997, defendant's condition deteriorated because his girlfriend Patsy was diagnosed with cancer. On December 9, 1997, defendant reported to Natu that he was having trouble sleeping and was using marijuana but not alcohol. Natu proscribed sleeping medication and warned him against using nonprescription drugs. When Patsy's condition became more serious, she entered Stanford Hospital.

Defendant stayed at Stanford Hospital from December 1 to 25 but was then thrown out for bad behavior. On December 24, 1997, a nurse at the hospital encountered defendant and smelled alcohol on his breath. The next day, Christmas day, a nurse saw defendant, who was upset about Patsy's condition. Sometime before 2:00 p.m., the nurse called security because she saw defendant walking on the third-story ledge of a parking structure in a wet suit. A hospital social worker went to the structure and found

defendant in his car smoking marijuana. They proceeded to a lawn area, where defendant set up a picnic, and they talked. The social worker testified that defendant was sad but not under the influence. Later, that day, a nurse reported defendant for acting inappropriately toward the nurses at the Intensive Care Unit (ICU). Defendant said he wanted to have sex with Patsy, but when told she was too sick, he became belligerent and screamed. At another point that day, a nurse saw defendant driving near the parking structure holding a can of something. He swerved behind the car of another nurse and almost hit it. Inside the hospital, the nurse in the car confronted defendant, saying he had almost hit her car. Although he was acting erratically and smelled of alcohol, he apologized. When the nurse told him to be more careful because he might kill somebody, he said he did not care.

Later that night, defendant was stopped by police near the hospital on suspicion of drunk driving. A breath test indicated that his blood alcohol content was over the legal limit. However, because he appeared so distraught about Patsy's condition, he was given the option of going to the emergency room for a psychiatric evaluation. There, defendant told the examining psychiatric physician that he had been sleeping six to seven hours per night. The physician found no evidence of manic or pre-manic symptoms.

Between December 25, 1997, and January 1, 1998, James Wieland, defendant's brother, stayed at defendant's house with him. Wieland said his family had been concerned about defendant's substance abuse since he was a teenager. According to Wieland, defendant had a low tolerance for alcohol, and when he drank, "it's like a Jekyll and Hyde, he becomes a totally different person." Defendant became manic and sometimes argumentative and "change[s] from a gentle to a violent person."

During their week together, Wieland drove with defendant numerous times. Defendant would not drink in front of Wieland because he had warned defendant not to drink and drive. Nevertheless Wieland smelled alcohol on defendant's breath a couple of times. The first few times in the car, defendant drove irrationally. He would speed,

tailgate, and pass slower cars on the right. Defendant also nodded off for a few seconds three or four times. When Wieland complained, defendant got mad. Afraid that defendant might kill somebody, Wieland called Natu and the Santa Cruz police. Wieland testified that after a few days, defendant calmed down and was able to focus more on driving because he was getting more sleep and taking his medication.

On December 29, Natu met with defendant and his boss Ann Asche. Patsy's condition had improved somewhat, but defendant still complained about not sleeping well. Natu proscribed Lorazepam, also known as Atavan, and Olanzapine, also known as Zyprexa. When Natu learned that defendant had recently been stopped by the police for drunk driving and was smoking marijuana, she reiterated her warning against drugs and alcohol. He agreed not to use them. Natu also gave the defendant's mediation to Asche for her to dispense. Asche called Natu the next day and reported that defendant seemed calmer.

Jeff Barker, a long-time friend of defendant, testified that on December 31, defendant visited him. Defendant, who was upset about Patsy, smelled of alcohol and slurred his words. When he said he had been stopped for drunk driving on Christmas day, Barker warned him against drinking and offered to drive him to Stanford. Barker said he drank beer with defendant many times and had seen him smoke marijuana, both of which seemed to relax him. However, sometimes when defendant drank, he became angry and upset, and on those occasions Barker avoided him.

On the evening of January 6, 1998, the day before the accident, defendant visited his coworker Rick Stamps. Defendant was in a good mood because Patsy seemed to be recovering. The two of them drank some beer, took methamphetamine, and played harmonicas together.

On January 7, at around 4:30 p.m., Bethann Robinson was driving north on Highway 85 when CHP Officer Greenly stopped her for tailgating. They parked on the shoulder, and Greenly asked for her license. He gave her a warning, and as she was

putting her license away, her truck "exploded." As she explained, "It was like a meteor hit my truck because my truck jumped sideways." When she looked up, Greenly was gone. She saw his body fly off the shoulder, and a speeding white car cross over all the traffic lanes and hit the center divider.

At around this time, Brenda Christian was in the slow lane of Highway 85 driving north at about 60 miles per hour. Suddenly, a man driving a light colored "Toyota style" car come up behind her at 75 or 80 miles per hour and passed her so closely the air moved her car. The car moved into the fast lane, cutting off the car next to her, back into the slow lane, cutting off two more cars, back into the fast lane, and then back into the middle lane. Less than a minute later, she reached the scene of a collision. A body was on the side of the road, and the speeding car had hit the center divider.

Doris McCullough was driving north in the slow lane and saw a police car and a truck parked on the shoulder. She noticed a car behind her to the left. It passed her going very fast, entered the right shoulder, hit the truck, and then skidded across the highway and into the divider.

Naoya Sugie was traveling as a passenger in a car going 60 to 65 miles per hour in the slow lane. Suddenly, a small white car passed quickly on the left. Over the next seven seconds, the car swerved sharply across the highway and accelerated to the side of the road and then hit an officer, who was standing there.

Shannon Beatie was in the middle lane driving at 65 miles per hour when a white car going about 75 miles per hour approached from behind to within a foot of her car. It then passed her on the right so fast her car fishtailed a little. She stopped and saw the car go off the side of the road and back on and then into the center divider. She testified that the driver was sitting up and looking straight ahead.

Kathleen McCarty was also driving on the highway and saw a small white car jump the curb, accelerate up the embankment, then back down, and hit two cars parked on the side of the road. It then continued on and drifted more slowly across the highway

into the center divider. She did not hear a tire blow out or see brake lights come on. Before the accident, she did not notice the car or observe any car driving erratically.

Roderick Hartman was the first person to reach defendant's car after it stopped. Defendant's face was bloody and swollen, his speech was impaired, and he seemed somewhat incoherent. Hartman smelled alcohol in the car and asked if defendant had been drinking. Defendant said a couple of beers.

CHP Officer James Healy interviewed defendant at the hospital about two hours after the accident. Defendant did not know what had happened and thought he had been driving on Highway 1. He variously reported that he had been driving home and to Stanford Hospital. He said he was tired and knew he should not have been driving. Healy smelled alcohol, and defendant said he drank two bottles of vodka sometime that afternoon.[1] When asked about other drugs, defendant said he was on Lithium but did not say when he had taken it. He did not mention taking methamphetamine, marijuana, Lorazepam or Zyprexa.[2] Defendant admitted having three prior DUI (driving under the influence of alcohol) arrests but did not mention that he was still on probation.

At the accident scene and later at the hospital, defendant received intravenous saline solution.[3] Two hours after the accident, a sample of defendant's blood was taken and tested. The tests revealed a .02 percent blood-alcohol content; .078 UG/ML (micrograms per milliliter) of methamphetamine; .0076 UG/ML of amphetamine; .31

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[1] A nearly empty 100 ml bottle of vodka (approximately three ounces) was found in defendant's car after the accident.

[2] At the scene of the accident, police found a bottle of Lorazepam. The prescription had been filled the day before, and the bottle contained 21 of the 30 proscribed. The prescription was for two pills per day.

[3] An expert witness testified that defendant was given a liter of saline solution. However, a records revealed that defendant received five centiliters at the scene and 200 more at the hospital.

MEQ/L of Lithium; 10 MG/ML of Lorazepam; 6.1 nanograms per milliliter of THC (the active ingredient in marijuana); and 62 nanograms per milliliter of carboxy THC.

To prove that defendant was impaired by the drugs and alcohol in his system at the time of the accident, the prosecution presented three expert witnesses: Dr. Randell Baselt, a forensic and clinical toxicologist and director of the Chemical Toxicology Institute; Dr. Alex Stalcup, the medical director of the an outpatient drug treatment center called New Leaf; and Dr. Forest Tennant, a researcher on drug dependence. All three experts reviewed the results of defendant's blood test, described the nature and amounts of each drug in defendant's system, and explained the individual and combined effects of each drug and alcohol on a person.[4] Based on their estimates of the amount of each drug and alcohol in defendant's system at the time of the accident, all opined that defendant was driving in an impaired condition.

However, Baselt conceded that if he viewed the blood test evidence as favorably as possible toward defendant, and assumed that at the time of the accident defendant had the lowest amounts of each substance in his blood and was sleep deprived, then there was a "theoretical possibility" that defendant was not impaired by the combination of substances and that mere "sleep debt" may have contributed to the accident. Given similar assumptions, Stalcup opined that the combination of substances would make the likelihood of falling asleep extremely high in someone with a sleep deficit. Tennant said he would expect a sleep-deprived person with the combination of drugs and alcohol to be impaired and even fall asleep.

To prove that defendant knew the dangers of driving while under the influence, the prosecution introduced evidence that defendant had four prior convictions for drunk driving, in 1981, 1983, 1984, and 1994. Concerning the 1994 conviction, CHP Officer

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[4] Defendant and the Attorney General have summarized in detail the experts' testimony, and we need not reiterate it here.

Brent Shultz testified that defendant's truck crossed over the center line, moved back to the right and almost hit a parked car, accelerated, swerved from side to side, and then went through a stop sign. After being stopped, defendant had difficulty producing his license and registration, his speech was slurred, his eyes were bloodshot, and he was unsteady on his feet. When he failed the sobriety test, he became boisterous and started to resist arrest. His blood alcohol content was .25.

The prosecution also introduced evidence that defendant attended three court-mandated programs for driving under the influence and substance abuse, in 1983, 1994, and 1997, and 11 weeks of Alcoholic Anonymous (AA) meetings. He admitted to program personnel that he was an alcoholic and chronically used marijuana. The 1994 program involved a 14-week class, in which he was taught the physical effects of alcohol, including the tendency of alcohol to sedate and the effects of combining alcohol with other common drugs, such as marijuana and methamphetamine. He was instructed on the effect of alcohol on underlying illnesses, including bipolar disorder. He was shown videos illustrating the dangers of driving under the influence. And he was told how drunk drivers shatter the lives of other people.

The 1997 program comprised 22 hours of substance abuse education. The program emphasized the problems associated with using methamphetamine and marijuana, including sleep deprivation and impairment of judgment and coordination. The program used videos, printed material, lectures, and group discussions to impress upon the participants the dangers of driving under the influence of methamphetamine and/or marijuana. The program also encouraged participants taking prescription drugs to obey the warnings on the labels.

A reconstruction expert examined the accident scene and vehicles. He found no mechanical defects in defendant's car that might have contributed to the accident. He opined that defendant's tire was not damaged until he collided with Robinson's truck on the side of the roadway. A CHP officer also testified that there was no evidence

defendant had a flat tire before the accident. Nor did he find any evidence that defendant did anything, such as braking, to avoid hitting the truck and Greenly.

The Defense

Annie Clegg, defendant's sister, disagreed with her brother James Wieland's testimony that defendant could not handle beer. According to Clegg, defendant never seemed to be impaired after a couple of beers or smoking marijuana but only "giddy and silly." However, she had never seen him drink vodka. She admitted that she had seen him drink to excess and become obnoxious and belligerent, and when he did, she asked him not to drink around her. On several occasions, she warned him not drink at all and not to drive when he was feeling manic.

Harry Krueper, a consulting engineer specializing in highway and traffic engineering, highway safety, and accident evaluation, testified as an expert in accident reconstruction. After reviewing reports of the accident, the preliminary hearing transcript, and data about previous accidents on that stretch of highway, he testified there was some similarity between the accident here and fatigue-related accidents, where, for example, a person falls asleep at the wheel. Specifically, there was no sign that defendant used his brakes, and his car went off the road, hit the berm, and went up and down the slope at a flat angle. He testified that it would take five to six seconds of inattention for a driver to go from the center lane to the berm. Hitting the berm would cause a total loss of control.

CHP Officer Brian Land interviewed defendant at the hospital after the accident. Defendant said he could not remember whether he stayed up late the night before the accident or what time he went to bed. He said he got up at 6:30 in the morning but did not remember whether he ate. He said he took his Lithium at 8:00 a.m. and went to work. He left at 2:00 p.m. and could not remember much of what happened after that. He did not recall drinking any alcohol and denied there was a vodka bottle in the car. Defendant admitted having prior arrests for drunk driving and recalled participating in

substance abuse programs, AA meetings, and a drug diversion program. However, he could not recall much of what took place in those programs and was not aware that he should not mix alcohol and Lithium. He asserted that the subject was not covered in the programs.

Dr. Bruce Victor testified as an expert in psychiatry and pharmacology. After talking with Asche and defendant and reviewing pertinent medical and psychiatric records and the preliminary hearing testimony, he opined that defendant suffered from bipolar disorder and that two weeks before the accident, defendant was experiencing the "manic end of bipolar disorder," in that he was irrational and lost impulse control. He said that defendant's Lithium level should have been higher and would not have caused him to be confused or sleepy. Victor did not think a person taking Lithium must absolutely abstain from alcohol, explaining that it all depends on how much Lithium and alcohol a person takes. He further testified that Lithium and marijuana should not be mixed, but a number of his patients report that the combination calms them down.

Dr. Robert Fitzgerald, an expert in the forensic analytic use of gas chromatography mass spectrometry and related areas, reviewed tests performed by Baselt to determine whether the active drug in marijuana was present in defendant's blood sample. He concluded that the tests were flawed, undermining the accuracy of their results. He further testified that chronic marijuana users build up a tolerance and are less seriously affected by it. Assuming that defendant took Lorazepam at a particular time the morning of the accident, Fitzgerald opined that he would no longer feel its effects by the time of the accident. The same was true if defendant ingested methamphetamine the day before the accident.

Halle Weingarten, a forensic toxicologist, reviewed the police reports, preliminary hearing transcripts, interviews, and blood-test results. She explained that a particular drug may or may not affect a person depending on the level or concentration in his or her system. She evaluated the nature and levels of each substance found in defendant's

blood.[5] Based on her assumptions concerning when defendant ingested the various drugs and alcohol, the amounts he ingested, and his tolerance for them, she found no basis to conclude that the drugs or alcohol, individually or in combination, affected defendant's driving, and therefore, she did not think it "likely" that he was impaired at the time of the accident. However, in reaching her conclusion, Weingarten did not consider the eye-witness reports that defendant was driving dangerously before the accident. She explained that she was not certain the reports referred to defendant and even if they did, she would not change her opinion because, as she explained, people drive dangerously even when they are not impaired by drugs or alcohol.

Dr. William Dement testified as an expert in sleep deprivation. He explained the causes and effects of sleep deprivation. After reviewing the preliminary hearing transcripts, witness reports, and accident analyses, he opined that if defendant had been sleeping five to seven hours per night up to December 25 but then zero to four hours per night for the next two weeks, he would tend to fall asleep when performing such tasks as driving, especially if the road was not challenging. In such a situation, a person could drift off the road without braking or changing direction.

Although Dement uses various tests to measure a persons sleep loss or debt, he conducted no such tests of defendant and did not interview him. He did not review defendant's medical or psychiatric records. And he conceded that there was no evidence that every night during the two weeks before the accident, defendant slept from zero to four hours and no evidence of how many hours he slept the night before the accident.

Several people who were driving on the highway at the time of the accident observed defendant's car veer off the road. None observed erratic or unusual driving before the collision.

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[5] Defendant has summarized Weingarten's specific testimony, and we need not repeat it here.

Defendant testified that before the accident he was taking three capsules of Lithium every morning. He said it never affected or impaired his performance as a fork lift operator. He said he started drinking beer and smoking marijuana when he was 18 years old and continued throughout his life. He tried other drugs, but not regularly, and took methamphetamines only six times. After his DUI arrests he would not drink for a while but then always started again.

In the days before the accident, he sometimes drank one or two six packs of beer. He said that two beers did not affect him or his driving. After three, he loosened up and felt good but did not think his ability to drive was impaired. He said he smoked marijuana a few times per night when he had it. The marijuana relaxed him. Although it slowed his thinking for a while, it did not affect his ability to focus or drive and did not make him sleepy.

Defendant could not recall whether the various substance abuse programs he attended over the years discussed Lithium, Lorazepam, methamphetamine, or Olanzapine. He knew there were discussions about alcohol and marijuana and that it was dangerous to drive when drunk. But he did not consider this message applicable because he never thought he was or would be a dangerous driver. He did not think the message applied to simply having a .08 blood-alcohol content. In all, he said the various programs had no impact on him.

Defendant testified that he had no idea how long any of the prescription drugs he was taking remained in his blood stream. Although Natu told him not to smoke marijuana, he disagreed because it helped him. Indeed, he said he smoked both when he drove and when he took Lithium and was confident that the combination did not impair him. He did not recall Natu telling him not to drink. Nor did he recall his brother telling him not to drink when he took Lithium. He said that he drank and took Lithium for a long time, and even after drinking six beers, he felt no ill effects from the combination.

Defendant said he visited Patsy at Stanford Hospital regularly and often stayed over night. However, it was noisy and he never slept more than five hours, and less when she was admitted to the ICU. At that time he was drinking beer and smoking marijuana. He remembered that on Christmas day 1997, a doctor intimated that Patsy might have to be taken off life support. He remembered smoking marijuana, talking to a person at the parking structure, and setting up a picnic. However, he did not recall acting inappropriately toward nurses. Nor did he recall talking to the nurse about a traffic incident or her telling him he might kill somebody. He did remember being stopped by the police, going to the psychiatric ward, and yelling at the staff.

During the week with his brother, defendant worked around the house, cleaned and painted, went to the beach, and surfed. He said he did not get much sleep. He drove with his brother to the hospital and sometimes fell asleep. He did not recall drinking before he drove or driving badly or dangerously. He did not think it dangerous to drive while he was tired because he would turn up the radio or stop and walk around.

Defendant admitted buying vodka to celebrate improvements in Patsy's condition. He did not recall telling an officer that he had two bottles. He did not think the two small bottles would cause him to drive off the road or crash. He did not remember visiting Natu with Asche on December 29. He said that Asche would give him medication but keep the bottles. He did not recall what if anything the labels said but did not feel groggy or impaired from the medication, alone or in combination with alcohol.

Defendant could not recall anything about the accident. He did not think the combination of drugs and alcohol in his system impaired him because the amounts were so small and his tolerance so high. He thought he simply fell asleep, but he could not say for sure.

III. Sufficiency of the Evidence

Defendant contends that there is insufficient evidence to support an essential element of his conviction for second degree murder: implied malice.[6]

In *People v. Hansen* (1994) 9 Cal.4th 300, 308, the court explained that malice is implied " 'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' [Citation.] We have held that implied malice has both a physical and a mental component, the physical component being the performance of ' "an act, the natural consequences of which are dangerous to life," ' and the mental component being the requirement that the defendant ' "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." ' [Citations.]"

When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320.) In making this determination, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (See *People v. Jones* (1990) 51 Cal.3d 294, 314.) Moreover, because it is the jury, not the reviewing court, that must be convinced of the defendant's guilt beyond a reasonable doubt, we are bound to sustain a conviction that is supported by only circumstantial evidence, even if that evidence is also reasonably

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[6] Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. (Pen. Code, §§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Although malice may be express or implied (Pen. Code, § 188), the prosecution here proceeded exclusively on the theory of implied malice.

susceptible of an interpretation that suggests innocence. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

In challenging the sufficiency of evidence, defendant first claims there is no credible evidence that he was substantially impaired at the time of the accident. He argues that "no rational jury could have concluded beyond a reasonable doubt that [his] driving behavior was the result of impairment due to the combination of substances in his blood versus his simply falling asleep at the wheel from fatigue." We disagree.

The jury reasonably could have believed the eyewitness reports about defendant's speeding, tailgating, and passing cars on the right just before the accident. Moreover, three prosecution experts testified that given the combination of drugs and alcohol in defendant's system, defendant was an impaired driver at the time of the accident. Expert opinion testimony constitutes substantial evidence when it is based on conclusions or assumptions that are supported by evidence in the record. (See *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

Defendant argues that the opinions of the prosecution's experts were not credible because they was no evidence to support them. Defendant bases this argument on the testimony of his experts and a view of the evidence and set of inferences and assumptions that are most favorable to the defense concerning (1) the time he ingested each substance, (2) the levels of each in his system at the time of the accident, and (3) the effect those levels of each substance would have on a person with a high tolerance.

For example, in challenging the experts' implicit finding that alcohol contributed to his overall state of being under the influence, defendant asserts that it is "likely" he consumed the nearly three ounce bottle of vodka "a very short time before the accident, such as within minutes," making it "unlikely" that it had any significant effect on him. He assumes that his blood-alcohol was less than .05 at the time of the offense, and he assumes that his slurred speech was due to his facial injuries. Similarly, in challenging

the prosecution experts' implicit finding that methamphetamine contributed to his overall state of being under the influence, defendant argues that although the "level of methamphetamine was within the abuse range for that drug," it was "consistent" with his having ingested in the night before, and paramedics observed no objective signs that he was under the influence of that drug. He also notes evidence that "[t]he average level of methamphetamine in the system of individuals arrested in Santa Clara County for being under its influence was four to five times the level that was in [his] system."

In our view, defendant's approach treats this court as if it were an independent fact finder, implicitly urging us to reweigh the evidence and credibility of witnesses, draw inferences inconsistent with the verdict, and disagree with the jury's findings and verdict. This approach is at odds with our duty to view the evidence in the light most favorable to, and draw all reasonable inferences in support of, the judgment. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 12.) The question before us is simply whether a reasonable jury could accept the testimony and opinions of the prosecution's experts and find that at the time of the accident, defendant was under the influence of, i.e., impaired by, the drugs and alcohol in his system at the time of the accident. Having reviewed the expert testimony in light of all of the evidence, we reject defendant's claim that the experts' testimony is, in essence, incredible as a matter of law.

We further find that a reasonable jury could reject the opinion of the defense experts. As noted, the jury could have believed those eyewitnesses who reported that defendant was speeding, tailgating, and passing cars on the right just before the accident. Consequently, the jury could have found that Weingarten's failure to consider defendant's dangerous driving undermined her opinion that he was not impaired. Indeed, when asked whether she would get in a taxi if the driver had consumed the same amount of alcohol defendant consumed, she said "[p]robably not."

Nor was the jury compelled to accept the evidence suggesting that defendant may have simply fallen asleep at the wheel. Defendant's aggressive driving before the

accident is somewhat inconsistent with a finding that he simply fell asleep, and defendant himself could not say for sure whether he fell asleep. Moreover, because the expert never tested or interviewed defendant and did not review defendant's medical or psychiatric records, and because there was no specific evidence concerning how much sleep defendant got the night before the accident, the jury could have declined to draw the inference that the accident resulted from sleep deprivation and fatigue.

Defendant relies on a host of cases, where the defendants' blood alcohol levels were greater than his or where the defendants exhibited more observable symptoms of intoxication that he did. However, these cases do not establish that there was insufficient evidence of substantial impairment. None of these cases prescribe a formula or establish minimum requirements for proving implied malice in a vehicular homicide case. (See *People v. Olivas* (1985) 172 Cal.App.3d 984, 988-989.) None of these cases involved the combination of alcohol, methamphetamine, Lorazepam, Lithium, marijuana found in defendant's blood. And none suggests that the expert testimony here was insufficient to prove substantial impairment.

Defendant next claims that there was no credible evidence that he was driving dangerously or recklessly before the accident and thus could have known from his driving that he was impaired and dangerous to others. He notes that several witnesses did not observe anyone driving badly before the accident, and there is no evidence of "pre-accident collisions, near misses with other cars or pedestrians, driving on the wrong side of the road, weaving over the center divider, reckless passing maneuvers, excessive speed on a city street or in heavy traffic, or leading the police on a chase." This claim is meritless.

As summarized above, Brenda Christian said defendant passed her at 75 or 80 miles per hour so closely she felt her car move. She also said he swerved from lane to lane, cutting off other drivers. Doris McCullough, who was in the slow lane, first saw defendant's car behind her on the left and then watched it speed by her on the right

shoulder. Naoya Sugie observed defendant pass quickly on the left then swerve sharply across the highway and accelerate toward the side of the road. Shannon Beatie testified that defendant came behind her within a foot of her car, going 75 miles per hour, and then passed her on the right so fast she fishtailed. This testimony was consistent with how defendant's brother described his driving, his near accident at the Stanford Hospital parking structure, and his driving at the time of his arrest in 1994 for driving under the influence. Moreover, although the defense witnesses may not have seen defendant driving dangerously, their testimony did not conclusively establish that he did not do so or prevent the jury from believing those who said he did.

Last, defendant claims there is no credible evidence that he subjectively knew driving under the influence of drugs and alcohol was dangerous to the lives of others. He notes that his previous arrests for drunk driving did not involve injuries to anyone, and on those occasions he was far more intoxicated than he was in this incident. He further notes that the various programs he attended failed to warn him about the possibly deleterious effects of Lorazepam on driving or the danger to others of driving under the influence of the *specific* combination of drugs and alcohol in his system at the time of this incident. Nor did these classes give him any reason to believe he would be impaired and dangerous given the amount of time between when he consumed the various substances and when the accident occurred. Defendant also argues that because he had taken Lithium and consumed alcohol and marijuana for years without any problems, the warnings by his brother and sister not to drive when consuming drugs or alcohol and Lithium did not inform him that he might be a danger to others. In all, defendant asserts that while he may have been indifferent to the consequences of driving under the influence, "it could not be said that he was consciously indifferent to human life by continuing to drive under the influence . . . ." This claim is also meritless.

The failure of a person with numerous drunk driving convictions to have ever killed or injured someone does not reasonably suggest that he or she may be unaware that

such conduct might cause harm others. Indeed, the potential danger of harm to others from driving under the influence is obvious, even to those who have not been through various treatment programs. In *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532, the defendant claimed that his previous convictions for driving under the influence were not probative on the knowledge element of implied malice, because the convictions showed only that he knew such driving was unlawful, but not that he knew it was dangerous. The court explained, however, that "the reason that driving under the influence is unlawful is *because* it is dangerous, and to ignore that basic proposition, particularly in the context of an offense for which the punishment for repeat offenders is more severe [citations], is to make a mockery of the legal system as well as the deaths of thousands each year who are innocent victims of drunken drivers. [¶] Moreover, included in the evidence of two of [the] defendant's convictions, as shown to the jury, was the sentence that he enroll in and complete a drinking driver's education program. Even if we assume [the] defendant did not realize after his *convictions* that it was dangerous to drink alcohol and drive, surely realization would have eventually arrived from his *repeated* exposure to the driver's educational program. To argue otherwise is little short of outrageous." (Original italics.)

Here, the record reveals that defendant attended three court-mandated programs for driving under the influence and substance abuse and went to AA meetings. The 1994 program explained physical effects of alcohol by itself and in combination with other common drugs, such as marijuana and methamphetamine. He was also instructed on the effect of alcohol on underlying mental illnesses, shown videos on the dangers of driving under the influence, and told how drivers who drink ruin the lives of others. The 1997 program emphasized the problems associated with using methamphetamine and marijuana and used videos, printed material, lectures, and group discussions to impress upon the participants the dangers of driving under the influence of methamphetamine and/or marijuana. The program also encouraged participants taking prescription drugs to

obey the warnings on the labels. Given defendant's attendance at these programs, we consider it unreasonable, if not absurd, to argue that since no one told him that mixing driving with alcohol, Lithium, Lorazepam, methamphetamine, and marijuana was dangerous to others, he had no idea that it would be.

We further note that in addition to these programs, numerous people, including family and friends, Natu, and a nurse, warned defendant not to drink and/or take drugs and drive, and the label on his prescription medication contained similar warnings. Defendant simply chose to ignore them. Moreover, despite the treatment programs, numerous warnings within a short time of the accident, including one by a nurse who said he might kill someone, and his prior experience driving recklessly and driving under the influence, defendant continued to drink and/or smoke marijuana, take methamphetamine and his prescription drugs, and drive.

Under the circumstances, the jury could reasonably reject defendant's self-serving testimony to the effect that he did remember much from the programs or know it was dangerous to drive under the influence of a cocktail of drugs and alcohol. Rather, the jury could reasonably find that defendant was adequately and repeatedly warned by numerous people that it was dangerous to drink and take prescription and/or recreational drugs and drive, and he consciously rejected these warnings and did so anyway.

In sum, therefore, we find substantial, if not strong, evidence to support defendant's convictions for second degree murder.

IV. Refusal to Give Special Instruction

Defendant contends the court erred in refusing his special instruction concerning when various blood-alcohol levels gives rise to a presumption that a person is under the influence.[7]

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[7] Defendant's proposed instruction mirrors the language of Vehicle Code section 23610, subdivision (a) and reads as follows: "The amount of alcohol in the person's blood at the time of the tests as shown by chemical analysis of that person's blood shall

"The trial court has a duty to instruct the jury on all principles of law relevant to the issues raised by the evidence [citation] and a correlative duty to refrain from instructing on irrelevant and confusing principles of law [citation]." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250, review den. Oct. 19, 1994.)

In *People v. Andersen*, *supra*, 26 Cal.App.4th 1241, the court addressed the same contention. In that case, a blood test revealed that the defendant had a blood-alcohol level of 0.022 and a methamphetamine level of 156 nanograms per milliliter at the time of the test. (*Id*. at pp. 1246-1247.) In rejecting the defendant's claim, the court explained, "The prosecution's theory of the case was that defendant was driving under the *combined* influence of alcohol and drugs. Since it is the *combination* that is alleged to have made defendant intoxicated, the level of alcohol alone in his blood is irrelevant. In these circumstances, an instruction couched in the language of [former] Vehicle Code section 23155, subdivision (a)(1), would have been highly confusing to the jurors. Accordingly, it was not error for the court to fail to give such an instruction." (*Id.* at p. 1250, original italics.)

Defendant argues that *Andersen* is inapposite because the defendant in that case had more methamphetamine and less alcohol in his system than defendant had and

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give rise to the following presumptions affecting the burden of proof. [¶] (1) If there was at that time less than 0.05 percent by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of an alcoholic beverage at the time of the alleged offense. [¶] (2) If there was at that time 0.05 percent or more but less than 0.08 percent by weight of alcohol in the person's blood, that fact shall not give rise to any presumption that the person was or was not under the influence of an alcoholic beverage, but the fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage at the time of the alleged offense. [¶] (3) If there was at that time 0.08 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person under the influence of an alcoholic beverage at the time of the alleged offense."

displayed more observable symptoms of a multi-substance intoxication than defendant did. We disagree.

We do not find that the different alcohol and methamphetamine levels here and in *Andersen* have any tendency to undermine the reason in *Andersen* or, more importantly, suggest that it is not applicable here. On the contrary, given the numerous different substances in defendant's system and given the conflicting expert opinion on the amounts and effect of each substance, individually and in combination, the primary issue for the jury was whether or not defendant was under the influence of his particular *mixture* of alcohol, methamphetamine, marijuana, and prescription drugs. Defendant's instruction focused on alcohol by itself and, in our view, would have been even more confusing here than under the facts in *Andersen*.

V. Admission of Documentary Evidence

Defendant contends the court erred in admitting documentary evidence to prove three of defendant's four prior drunk driving convictions. He argues that the information on the documents is hearsay and not admissible under the exception for official documents. We disagree.

The court admitted into evidence copies of three file cards created by Nancy Campeau, the senior supervision legal secretary at the Santa Cruz County District Attorney's Office. The cards reflect defendant's drunk driving convictions in 1981, 1983, and 1984. Campeau testified that among her official duties was "[c]ase entry, preparation with the attorney of cases for trial, preparing court documents, pulling files for court calendars, entering the outcome of court dates." With respect to entering the outcome of court proceedings, she explained that until record keeping became computerized, she was "typing [the outcome] on three-by-five cards. We note the date of an arraignment; and then, for instance, enter if there is a plea entered, show the plea. If they're sentenced at that point, show the sentence; or the next upcoming court date, and on through the cycle." To do this, she would use the court documents, which the

attorneys brought back from court, and record the information on the cards, usually the same day, for their own internal information system. These cards were then kept secure in a locked part of the district attorney's office and are not available to the general public. The record also reveals that the official documentation for defendant's three convictions were purged and are no longer available.

Evidence Code section 1280 provides, "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

"A trial court has broad discretion in determining whether a party has established these foundational requirements. [Citation.] Its ruling on admissibility 'implies whatever finding of fact is prerequisite thereto; a separate or formal finding is, with exceptions not applicable here, unnecessary. [Citation.]' [Citation.]" A reviewing court may overturn the trial court's exercise of discretion ' "only upon a clear showing of abuse." ' [Citations.]" (*People v. Martinez* (2000) 22 Cal.4th 106, 120.)

Given Campeau's testimony, the court could reasonably find that (1) the creation of court-information cards, reflecting the ongoing procedural history of a cases in the district attorney's office, was a function that came within the course and scope of Campeau's official duty as a public employee; (2) the cards were created at or near the time the events recorded on them took place; and (3) the sources of information and method of recordation indicate that the cards were trustworthy.

Defendant argues that because the cards were simply part of the district attorney's internal record system and because no statute mandated the creation of such records, the cards fail to satisfy the first prerequisite for admission as a public record. In support,

defendant cites, among other cases, *Pruett v. Burr* (1953) 118 Cal.App.2d 188, 201, for the proposition that a public records or documents are ones " 'which are required by law' " to be kept by a public officer. However, as defendant acknowledges, *Pruett* also includes within its definition records " 'which [a public officer] keeps as necessary or convenient to the discharge of public duties.' " (*Ibid*.) Campeau's testimony and the fact that official records of defendant's convictions have been purged support a finding that the district attorney keeps the record cards as necessary and convenient to the discharge of public duty.

VI. CALJIC 17.41.1

Defendant contends the court committed per se reversible error in giving CALJIC No. 17.41.1. As given, this instruction advised the jury as follows: "The integrity of a trial requires that jurors at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Defendant claims the instruction misstates the law and deprived him of due process, a fair trial, and a unanimous verdict and invades the jury's right to privacy and secrecy during its deliberations and infringed upon its right of nullification.

Defendant's claim was recently rejected by the California Supreme Court in *People v. Engleman* (2002) 28 Cal.4th 436.

VII. Refusal to Reduce Murder to Manslaughter

Defendant contends that because there was insufficient evidence to support the verdict of second degree murder and because a sentence of 15 years to life violates the constitutional proscriptions against cruel and unusual punishment, the trial court abused its discretion in denying his motion to reduce his conviction to manslaughter. We find no abuse of discretion.

As discussed above, the jury's verdict is supported by substantial evidence. Second, the nature of the offense or offender, the degree of danger he presents to society, the punishment imposed in California for more serious offenses, or the punishment imposed for second degree murder in other jurisdictions—none of these factors suggests to us that defendant's sentence is cruel or unusual. (See *In re Lynch* (1972) 8 Cal.3d 410, 425-427; *Solem v. Helm* (1983) 463 U.S. 277, 296.) Under the circumstances, therefore, defendant has failed to demonstrate that the court acted unreasonably, arbitrarily, or capriciously in denying his motion to reduce his conviction.

Defendant's reliance on *People v. Dillon* (1983) 34 Cal.3d 441 is misplaced. There, an "unusually immature" 17-year-old high school student with no prior criminal record was convicted of first-degree felony-murder committed during an aborted attempt to steal marijuana from a farm. The evidence revealed that when the grower confronted defendant and his confederates with a shotgun, the minor panicked and shot him. (*Id*. at pp. 451-452, 483.) Before and after its verdict, the jury indicated that it was reluctant to find the defendant guilty of first degree murder. Moreover, the trial court sentenced him to the California Youth Authority (CYA). However, the order was reversed, and the court then sentenced him to life in prison. The California Supreme Court concluded that given the nature of the offense and the offender, the life sentence constituted cruel and unusual punishment, and so it reduced the conviction to second degree murder.

Here, defendant was in his forties when he committed his offense. He has four prior drunk driving convictions. He has been through various substance abuse programs. He was warned by numerous people not to mix recreational drugs, alcohol, prescription medication and drive. He knew he suffers from bipolar disorder and knew that his manic symptoms could be managed with proper and appropriate medication. He knew he was under stress due to Patsy's illness. He was stopped for suspected drunk driving shortly before the accident, and he was specifically warned by another person that he could kill

somebody by the way he was driving. He nevertheless consumed a variety of substances and elected to drive. He then drove in a dangerous manner and ultimately killed Greenly.

In our view, *Dillon* does not suggest that that the level of defendant's culpability for Greenly's death does not warrant the sentence he received or that his sentence is grossly disproportionate to his criminal conduct.

VIII. Disposition

The judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.